

ESTTA Tracking number: **ESTTA334523**

Filing date: **02/26/2010**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91181755
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Attachments	A_Trial Brief_02-26-2010.pdf ( 28 pages )(111316 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

FRANCISCAN VINEYARDS	)	
	)	Mark: BLACK RAVEN BREWING COMPANY
Opposer	)	Opposition No.: 91181755
v.	)	Serial No.: 77223446
	)	
BEAUXKAT ENTERPRISES LLC	)	
	)	
Applicant	)	
	)	

**APPLICANT’S TRIAL BRIEF**

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## **I. INTRODUCTION**

The essence of the likelihood of confusion analysis is the similarity of the marks such that consumers are likely to assume that two products have the same source. Here, a look at the marks in question puts that concern to rest. Opposer Franciscan Vineyards, Inc. (“Franciscan”) owns and uses marks that either include the word RAVEN in part of the mark, or are stylized pictographs intended to evoke ravens. Franciscan’s marks sell its wines and other novelties carrying Franciscan’s wine logos and names. However, Franciscan does not own a mark for simply “RAVEN”.

Contrast Franciscan’s actual marks with Applicant BeauxKat Enterprises, LLC (“BeauxKat”) and its word mark for beer, BLACK RAVEN BREWING COMPANY. While the two marks share RAVEN, they do not represent identical products or services, and therefore, sharing a single word is insufficient basis for a finding of being confusingly similar. There is simply no reason to believe that any party seeing the two sets of marks would make the leap to thinking that the source of the different products is the same.

Moreover, while there is no doubt that the goods covered by these marks both contain alcohol, there is evidence that the actual markets for beer and wine are relatively distinct. This serves to further diminish any likelihood of confusion.

Absent any evidence of actual confusion and no evidence establishing a likelihood of confusion, the Board should find in favor of registration of the BeauxKat’s mark.

## **II. PROCEDURAL HISTORY/DESCRIPTION OF RECORD**

### **A. PROCEDURAL HISTORY.**

The statement of the procedural history of this Opposition in the Opposer’s Trial Brief is sufficiently accurate to be accepted by the Applicant.

### **B. DESCRIPTION OF RECORD.**

#### **1. Objections to Opposer’s Evidence.**

##### **a. Opposer’s 6<sup>th</sup> Notice of Reliance.**

Opposer’s 6<sup>th</sup> notice of reliance consists of two items: (1) a listing printed out from the TESS system of 267 marks that include both “wine” and “beer” in their product listing; and (2) printouts of the first 50 of these registrations as “representative registrations”. Interestingly, when BeauxKat submitted similar lists of registrations, Franciscan filed a motion to strike.

Accordingly, the lists submitted as Exhibit 1 to this notice of reliance must be stricken to the extent that they do not have accompanying registrations. As it was put in regard to Applicants' notice of reliance, TESS results are not official records, and cannot be submitted as the same.

In addition, the remainder of the 6th notice of reliance should be stricken as not relevant under ER 402, and/or as having only limited probative value that is exceeded by its prejudicial effect under ER 403. Franciscan uses this notice to buttress its claim that beer and wine are "related" products. The argument is that if there are marks that name both beer and wine as categories, the products must be related. However, a closer look shows that this evidence cannot support such a claim.

Of the 50 marks for which the actual registrations are submitted only a few of the marks are actually for wine and beer alone. Several of the marks have not only beer and wine, but literally thousands of items in their categories.<sup>1</sup> These marks would also make beer a related product to such things as deodorant and plastic sandwich bags.<sup>2</sup> Nor does this analysis tell us what would truly be useful, which is what percentage of total marks for beer also include wine, and vice versa.<sup>3</sup> Absent a clearer categorization, just a stack of 50 registrations makes it no more or less likely that beer and wine are related products, and therefore the evidence is irrelevant, or at least more prejudicial than probative. Accordingly, Opposer's 2<sup>nd</sup> notice of reliance should be stricken, or alternatively afforded essentially no probative weight.

**b. Opposer's 9<sup>th</sup> Notice of Reliance.**

As its 9<sup>th</sup> notice of reliance, Franciscan submits pages from the Webster's Dictionary attempting to conclusively establish that the word "raven" necessarily implies "black". This evidence is objected to as irrelevant under ER 402, and as inaccurate, and therefore more prejudicial than probative under ER 403.

This Board is entitled to take judicial notice of facts in nature that are true and need no proof. Even the most cursory look to any zoological database or book will show the Board that ravens come in a variety of colors, including brown and multicolored versions. Whether or not Webster's thinks all ravens are black is certainly not relevant to this matter or to what consumers

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<sup>1</sup> See, e.g. Opposer's 6<sup>th</sup> Notice of Reliance, p.18-24 (registration for TESCO).

<sup>2</sup> *Id.*

<sup>3</sup> As an aside, the Board is certainly capable of performing such an analysis and taking judicial notice of the results. This analysis was done in Applicant's 2<sup>nd</sup> Notice of Reliance, which was stricken.



actually think. Accordingly, Opposer's 9<sup>th</sup> notice of reliance should be stricken or alternatively given little or no probative weight.

**2. Applicant's Evidence and Response to Opposer's Objections.**

**a. Applicant's 4<sup>th</sup> Notice of Reliance.**

The 4<sup>th</sup> notice of reliance from BeauxKat is a series of pages from magazines that are excerpted in Franciscan's 2<sup>nd</sup> notice of reliance. The point of the pages from the exact same issues excerpted by Franciscan is a qualitative one. The *DuPont* factors are not analyzed in scoreboard fashion, the party "winning" the most factors winning the case. No, the factors are actually analyzed and weighed, with some factors being more important in certain situations than others.<sup>4</sup> In other words, the context of the evidence and the qualitative differences are critical to allow the board to weigh evidence.

Applicant's 4<sup>th</sup> notice of reliance provides that context and qualitative evidence. The excerpts contained therein demonstrate that while beer and wine may be advertised in these periodicals, so are any number of other products. The fact that these two goods use a trade channel that is used by almost literally every other type of good available, related or otherwise, decreases considerably the likelihood that a consumer could be confused should the Parties decide to use this particular channel of trade.

This evidence is most likely not completely dispositive of the issue, but neither is it irrelevant. Applicant's 2<sup>nd</sup> notice of reliance should be admitted.

**b. Engler Testimony.**

Opposer objects to Mr. Engler's testimony by claiming that he is not an expert, and that he is biased and based some opinions on hearsay. They also raise the lack of a witness disclosure for Mr. Engler prior to the scheduling date.

In this matter, the date for witness disclosure was originally set for August, 2008.<sup>5</sup> That date was moved once at the behest of the Board. However, it was not until the Opposer filed its motion for summary judgment that BeauxKat was put on notice that Franciscan was making an argument claiming that beer and wine shared identical marketing channels.<sup>6</sup> Once that argument

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<sup>4</sup> See Footnotes 20-22.

<sup>5</sup> Order dated January 8, 2008.

<sup>6</sup> Opposer's motion for summary judgment, dated December 8, 2008.

was made, the need for expert testimony to refute it became clear, and Mr. Engler's declaration in support of the opposition to the Motion for Summary Judgment was filed in a timely manner in January 2009. Mr. Engler was properly noted as an expert in Applicant's Pretrial Disclosures, his deposition was noted properly within the allowed time for trial testimony, and Opposer participated in that deposition, cross-examining the witness with no limitations whatsoever.

FRCP 37(c)(1) governs situations where disclosure of experts is made late. A party may make a late disclosure if the disclosure is "substantially justified" or is harmless. Here, the facts are that there was no way that BeauxKat could know they needed the specific testimony of an expert like Mr. Engler until the summary judgment motion was filed. Once that motion was filed, Mr. Engler's declaration (which contains the information that would be included in a FRCP 26(a)(2) disclosure) was filed in early January 2009, leaving Franciscan more than ample time to address the issue. Franciscan did not have to make its pretrial disclosures until April 21, 2009, after the summary judgment motion had been denied.<sup>7</sup> By that time, Franciscan had known of Mr. Engler's testimony for over four months and could have named a competing expert of their own. They chose not to do so. Moreover, Franciscan had full opportunity to cross-examine Mr. Engler in his deposition, and they did so.<sup>8</sup>

Having ignored the opportunity to name opposing experts and having extensively cross-examined Mr. Engler, there can be no harm to Franciscan at this point in his testimony being admitted.

Mr. Engler testified as an expert on the differences in the end users and marketing of beers and wines. His qualifications were discussed at length in both his declaration in opposition to the motion for summary judgment, and in his deposition.<sup>9</sup> Most of his knowledge comes from his experience in owning and operating a store called "Malt & Vine" in which he sells beer, wine and other spirits. ER 702 requires that an expert be qualified by "knowledge, skill, experience, training, or education". Franciscan's objection to Mr. Engler's qualifications does not state why it believes he is not qualified other than calling into question his lack of degree. However, his qualifications meet the standard of the ER 702 in that he has specific experience in the sale of

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<sup>7</sup> Order dated April 3, 2009.

<sup>8</sup> Deposition of D. Engler, p. 17-50.

<sup>9</sup> Deposition of D. Engler, p. 5-9; Declaration of D. Engler dated Jan. 5, 2009.

beer and wine to customers through the operation of his retail outlet. Mr. Engler is qualified to testify in this matter.

Franciscan also calls Mr. Engler “biased” due to his familiarity with BeauxKat’s products and because he knows the principals of BeauxKat. Generally, bias is not an accepted basis for excluding an expert due to the fact that the opposition gets the opportunity to cross-examine the witness.<sup>10</sup> Bias is an issue of weight, not admissibility, and determinations of weight are generally given to the finder of fact.<sup>11</sup> Even if a true bias had been established, there is no basis for excluding Mr. Engler’s testimony, and no real bias has been established via cross-examination.

Franciscan also made a hearsay objection to a portion of Mr. Engler’s response to a cross-examination question. The question itself has to do with the source of Mr. Engler’s knowledge on a particular statement in his Declaration.<sup>12</sup> Pursuant to ER 703, the sources of an experts’ knowledge need not be admissible evidence for the expert to opine. Therefore, even if sustained, Franciscan’s objection will have no effect on Mr. Engler’s opinions.

**c. Gillespie Exhibits/Testimony.**

Franciscan’s objections to the exhibits to Ms. Gillespie’s testimony are of two natures: Exhibits 5 and 11 are objected to as hearsay based on the fact that the printouts come from the Internet; and Exhibit 8 is objected to based on Franciscan’s characterization of their source periodicals not being of “general circulation”.

Franciscan’s objections to Internet publications appear to be based on their lack of knowledge as to whom actually located and printed the articles from the Internet. This must be the case because the articles themselves are not offered for the truth of the matter asserted, and therefore would not be hearsay under ER 801(c). These articles are simply offered for the fact that BeauxKat has been the subject of some press interest. The truth of the matters asserted within the article is not the point, and therefore these articles cannot be hearsay.

With regard to the internet issue, the problem with Internet-based materials is simply one of authentication. Ms. Gillespie has authenticated the articles as genuine, and as a principal of

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<sup>10</sup> *DiCarlo v. Keller Ladders, Inc.*, 211 F.3d 465, 468 (8<sup>th</sup> Cir. 2000).

<sup>11</sup> *Id.* (Citing 3 Weinstein’s Federal Evidence §601.03[2][a] at 601-13, McLaughlin ed., 2d ed. 2000).

<sup>12</sup> Deposition of D. Engler, p.42,ln. 18- p. 43, ln. 15.

BeauxKat who has been the subject of the articles in question, she has reason to have knowledge of their authenticity.<sup>13</sup>

As to the objections to Exhibit 8, there is no objection based upon authenticity to this document, as Ms. Gillespie was present when it was sourced. The objection is instead that the newspaper and bulletin in which the items are printed is not of “general circulation”. Note that the objection noted in the deposition was “hearsay”.<sup>14</sup> As that objection is not noted in Franciscan’s trial brief, it is not addressed here. Certainly, if they are making the objection, Franciscan should bear the responsibility of proving that the papers named herein, the Redmond Reporter and the Redmond Chamber of Commerce Bulletin of not of “general circulation”. Absent such proof, BeauxKat cannot adequately respond to this objection and it should be overruled.

Franciscan mentions three other specific objections made during the Gillespie deposition. As to the hearsay statement regarding the Bowman background, Mr. Bowman has also testified to the same, and his testimony cannot be hearsay. If this statement is stricken, the record will not be affected in any meaningful way, so the objection is moot.

Regarding the issue of leading the witness, the proper ruling on this issue would be a simple instruction to forego such leading, not any exclusion of evidence, so this objection should be overruled.

**d. Bowman Exhibits/Testimony.**

To the extent that the objections to the Bowman exhibits are identical with the Gillespie exhibits, or to the extent that objections are based on the fact that the items were downloaded from the Internet, the response regarding those items is found above, and will not be repeated here. It is important to note that none of these items is offered for the truth of the matters asserted therein, but to show that there is indeed press regarding BeauxKat’s endeavors. They are therefore not hearsay.

With regard to the “lack of foundation” objections, we will rely on the Board’s judgment, as Franciscan has not explained or backed up its objections in its briefing.

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<sup>13</sup> Deposition of K. Gillespie, p. 16.

<sup>14</sup> Deposition of K. Gillespie, p. 16, ln. 20-21.

### **III. STATEMENT OF ISSUES.**

- A. Whether the Board should find for the Applicant when the Opposer's evidence is limited and contains no evidence of actual confusion or of any specific factor that will cause confusion?
- B. Whether the Board should find for the Applicant when the parties' marks do not share a common category, and beer and wine are not "related products".

### **IV. RECITATION OF FACTS.**

#### **A. FRANCISCAN'S MARKS.**

Franciscan's statement of facts is mostly accurate, in that it states that Franciscan has marks and that it uses its marks. Indeed, BeauxKat does not dispute that Franciscan's marks exist, nor that they are used. The key points, however, that must be garnered from Franciscan's recitation of its products and their distribution is that Franciscan does not make, market, or have any economic interest that has anything to do with beer. Even in reciting the nature of the barbecues held at their public picnic facility, there is no mention of beer being served. Indeed, one would be surprised to find a winery of Franciscan's nature serving beer on their premises. This is because beer and wine have at their core a different target market.

Also important to note, only three of Franciscan's nine named marks are for wine. The others are for such far-ranging products as barbeque sauce and clothing.

Franciscan devotes much of its effort to describing the fact that many beverages share some distribution channels. No one disputes that some restaurants, liquor stores, and markets sell both beer and wine. However, Franciscan ignores entirely the differences between the merchandising of beer and wine (and of course other beverages). In that context, beer and wine are treated completely differently.

Doug Engler's testimony in this matter more clearly explained this concept. Mr. Engler, a retailer who devotes his professional life exclusively to beer and wine, describes in detail the differences in markets and merchandising of beer and wine.<sup>15</sup> In truth, the markets treat these products differently, and they are marketed to different people, especially products like those of BeauxKat and Franciscan.

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<sup>15</sup> Deposition of D. Engler Dec. p. 9-16.

## **B. BEAUXKAT’S BACKGROUND.**

BeauxKat Enterprises, LLC was formed in January 2007 by its principals, Robert “Beaux” Bowman and Katherine Gillespie. BeauxKat was formed from its principals’ desire to open a local brewery and taproom where Beaux’s original microbrews would be featured. Beaux is an award-winning brewer who has been involved in brewing beers for nearly eight years.

BeauxKat sought and obtained registration of the word mark “BLACK RAVEN BREWING COMPANY”.<sup>16</sup> BeauxKat’s intent for the use of its mark is simple. They want to protect their right to use their mark on their beers. That is it in a nutshell. They are not seeking to trademark its use on any other type of product. They intend to be a local microbrewery in the Seattle area market. This may eventually involve some level of distribution of its product, as microbreweries sometimes have their beers available at other brewpubs. This will also likely involve the presentation of BeauxKat’s beers at some national events, specifically the Great American Beer Festival in Denver, Colorado, and the Craft Brewers Conference/World Beer Cup.

## **III. ARGUMENT**

### **A. STANDARDS FOR OPPOSITION.**

An opposition to trademark registration can be maintained by a party who would be “damaged” by the registration of the mark.<sup>17</sup> This “damage” is “legal damage” as opposed to “actual damage”, and therefore can be established by proving that there is a “likelihood of confusion” at trial.<sup>18</sup> Franciscan, as the opposer in this matter, has the burden of proof at trial.<sup>19</sup> Likelihood of confusion, of course, is established (or disproven) by using the *DuPont* factors.<sup>20</sup>

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<sup>16</sup> Application, Ser. No. 77/234,446.

<sup>17</sup> 15 USCA §1063(a).

<sup>18</sup> *Massey Junior College, Inc., v. Fashion Institute of Technology*, 492 F.2d 1399, 1403, 181 USPQ 272 (1974); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1100-1, 192 USPQ 194 (1976).

<sup>19</sup> *Massey*, *supra*, at 1403.

<sup>20</sup> *In re E.I. DuPont de Nemours & Co.*, 177 USPQ 563 (CCPA 1973).

In considering these factors, “not all of the *DuPont* factors are relevant or of similar weight in every case.”<sup>21</sup> Indeed, any one of the factors may control a particular case.<sup>22</sup>

**B. ANALYSIS OF THE APPROPRIATE *DUPONT* FACTORS SHOWS THAT THERE IS NO LIKELIHOOD OF CONFUSION.**

**1. The marks, in their entireties, are not confusingly similar.**

Franciscan’s evidence on this *DuPont* factor is extremely brief: all the marks at issue have some form of raven in them, whether in word or pictorial form. Franciscan then deconstructs the marks via various authorities in an attempt to eliminate any portion of the marks that is not a raven. However, analysis of the authorities on this issue demonstrates that such deconstruction is not appropriate in this case.

**a. Deconstruction of the marks is not appropriate when the goods designated by the marks in question are not identical.**

Franciscan’s deconstruction of the marks is not appropriate. The *Massey* court, cited above, addressed this issue very specifically:

That marks must be considered in their entireties in determining whether there is likelihood of confusion or mistake is a basic rule in comparison of marks. Here the board, having determined that the services of the parties were ‘generally similar,’ sought to establish an exception to the rule, namely: if the most prominent feature of a mark creates a commercial impression separate and apart from the remaining features of the mark, any confusing similarity with respect to it is determinative with respect to the mark in its entirety. We know of no authority which supports such an exception and hold that the board erred on this point.<sup>23</sup>

Franciscan commits this exact error in its briefing.

Certainly there are cases that allow for such deconstruction of marks, but it is almost always associated with identity in the goods or services provided, rather than the products being

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<sup>21</sup> *Opryland USA Inc. v. Great Am. Music Show*, 970 F.2d 847, 850, 23 USPQ2d 1471, 1473 (Fed.Cir.1992); *In re Shell Oil*, 992 F.2d at 1206, 26 USPQ2d at 1688 (the various *DuPont* factors “may play more or less weighty roles in any particular determination”).

<sup>22</sup> *DuPont*, 476 F.2d at 1361-62, 177 USPQ at 567.

<sup>23</sup> *Massey*, *supra*, 492 F.2d at 1402.

“generally similar” as was the case in *Massey*.<sup>24</sup> In *Century 21 Real Estate Corporation v. Century Life of America* the Court made this distinction clear: “When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.”<sup>25</sup>

In a practical sense, this distinction is natural to trademark law. While trademark would and should prevent a competitor selling the identical product from using a name that has a dominant feature that is the same, when dealing with products that have only a marginal or ancillary connection, a near identity of the mark is necessary to prove likelihood of confusion. Identical product cases focus on one aspect of the Mark, and call it the “dominant portion.” While the law sometimes allows analyzing just dominant portions of marks, the law is clear that the examination may not completely disregard the marks in their entirety. This Board must examine the marks in their entirety.

The cases suggest a continuum where on one end are situations where the goods or services are identical, and therefore only the smallest quantum of identity of the marks is required to be “confusingly similar”, and on the other end are situations where there is absolutely no relation between the goods, and therefore similarity would only be found where the marks were so identical that they could generate confusion without reference to their corresponding products. The question then, is where on the continuum does this case fall? The *Massey* court provides the answer: where products have “general similarity”, reliance on a prominent or dominant feature of a mark is not appropriate and marks must be considered in whole.<sup>26</sup>

Franciscan attempts to skip this analysis by alleging that consumers “will refer to Applicant’s beer as RAVEN or at the most BLACK RAVEN.”<sup>27</sup> Certainly where such nicknames are shown to be used, the Board could take such a nickname into account, but such analysis in this case strains credibility. There is literally no evidence from which anyone can make such a finding. Indeed in his deposition, Mr. Bowman testified that the name of each beer

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<sup>24</sup> *Id.*

<sup>25</sup> *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 877, 23 USPQ2d 1698 (1992).

<sup>26</sup> *Massey*, *supra*, 492 F.2d at 1402.

<sup>27</sup> Opposer’s Trial Brief, p. 13.



made by BeauxKat is different, for example, Trickster IPA or La Petit Mort.<sup>28</sup> Each are identified by the brand name, BLACK RAVEN BREWING COMPANY, but that name will apply to many beers at one time. One could not walk into the Black Raven taproom and simply order a RAVEN or a BLACK RAVEN.

In this case, whether or not the Board decides that beer and wine are “related” or unrelated, there cannot be more than a “general similarity” between the two. Thus, Franciscan’s deconstruction of the marks should be rejected.

**b. The marks themselves are not identical.**

Interestingly, it is a case that factors prominently on the “related product” issue that provides a guideline for the analysis of this issue. The Court in *In re Coors Brewing Co.* was called on to analyze the similarity of two pictorial marks that featured the words “Blue Moon”.

Both marks contain the words “Blue Moon” in all capital letters, and those words are prominent in each mark. The Coors mark contains the disclaimed words “Brewing Co.,” but because those words appear at the bottom of the mark in significantly smaller font, it was reasonable for the Board to find that those words do not significantly contribute to distinguishing the two marks.

...

Although we uphold the Board's finding that the two marks are generally similar, principally because they both use the term “Blue Moon,” we note that similarity is not a binary factor but is a matter of degree. Because there are significant differences in the design of the two marks, the finding of similarity is a less important factor in establishing a likelihood of confusion than it would be if the two marks had been identical in design or nearly indistinguishable to a casual observer. *See, e.g., Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed.Cir.1992); *In re Opus One, Inc.*, 60 USPQ2d 1812, 1815, 2001 WL 1182924 (TTAB 2001).<sup>29</sup>

The *Coors* court correctly upholds the principle ignored by Franciscan. Similarity is a matter of degree dependent not only on the identity of the underlying products, but the degree to which the two marks are in fact identical.

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<sup>28</sup> Deposition of B. Bowman, p. 59-61.

<sup>29</sup> *In re Coors Brewing Co.*, 343 F.3d 1340, 1344, 68 U.S.P.Q.2d 1059 (2003).

Comparing this analysis to our facts at hand, it seems that if the two marks contain a single common feature that is not the end of the analysis, as Franciscan would have you believe. Like the two marks in *Coors*, the marks here are not indistinguishable or even identical in design. Indeed it is hard to see how a consumer would look at the celtic design of Franciscan's pictorial marks (or even its word marks) and be confused by the word mark of BeauxKat. Therefore, before we even consider whether or not there is a similarity, we must start with the premise set by the *Coors* court: that any similarity found is less important in the likelihood of confusion analysis than other factors because the marks do have significant differences, even if they share a word.

Franciscan argues that under this factor the Board may consider its pictorial marks to be the equivalent of a word mark (sometimes called the "equivalence" principle). However, a look at the cases to which Franciscan cites is illuminating on the proper application of this principle. In the *In re Duofold* case, the marks being compared were the words GOLDEN EAGLE and a pictorial representation of a golden eagle.<sup>30</sup> In the *Spaulding Bakeries* case, the marks being compared were the words OLD MILL and a pictograph of an old fashioned mill.<sup>31</sup> In the *Coors* case cited above, the marks being compared used identical words, BLUE MOON.<sup>32</sup> The point is that in these situations where a pictorial representation was found to be similar to the word mark, the word mark and the picture were an exact match: a picture of a golden eagle and the words GOLDEN EAGLE, a picture of an old mill and the words OLD MILL. Therefore the analysis stated by Franciscan was true in those cases, the picture could spark a perfect recollection of the mark, because they had identity.

The *Spaulding Bakeries* Court warned against taking this type of analysis too far. They added additional conditions to making this leap:

[N]ot only must the pictorial representation be readily recognized by the average purchaser of the goods involved as the equivalent of a literal term, but it must be of such a nature that the purchaser would be prone to "translate" and not accept it for what it is,

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<sup>30</sup> *In re Duofold*, 184 USPQ 638, 638-9 (TTAB 1974).

<sup>31</sup> *Spaulding Bakeries, Inc. v. Interstate Brands Corp.*, 209 USPQ 355, 356 (TTAB 1980).

<sup>32</sup> *In re Coors Brewing Co.*, *supra* at 1344.

namely, a design mark in the normal or average marketing environment for the goods with which it is used.<sup>33</sup>

The Court added that the burden of proof of establishing that purchasers act as set forth above is on the party who is attempting to use the equivalence principle.<sup>34</sup>

Applying these principles to the case at hand, we see that first, the pictorial marks of Franciscan consist of ravens. If BeauxKat was seeking to register the word RAVEN alone, then the equivalence principle might apply. But BeauxKat's mark is BLACK RAVEN BREWING COMPANY. This lack of identity becomes more telling because Franciscan has not offered any evidence that purchasers would act as described by the *Spaulding Bakeries* Court above. Absent any such evidence, the Board should not equate Franciscan's pictorial marks with BeauxKat's Mark and as to the pictorial marks, there is no similarity.

Franciscan tried an end run around this rule by comparing the RAVEN pictorial mark to the "trade dress" for BeauxKat.<sup>35</sup> They rely on the *In re Nationwide Industries* case to say that context of use and packaging can be relevant in this analysis.<sup>36</sup> However a look to that case only serves to further emphasize the point made above, that it is only when the goods in question or the marks in question are truly identical that such an analysis is appropriate.

The marks being compared in the *Nationwide* case are two products for the breakup and/or removal of rust going under the marks RUST BUSTER and BUST RUST. The section of the case that immediately follows the quote used by Franciscan points out the reason why such an analysis is not applicable here.

Here, ***where the goods are legally identical***, and where both marks, when applied to the goods in question, are likely to be perceived by purchasers as signifying that the product sold thereunder busts through, or breaks up, rust, we agree with the Examining Attorney that the marks create substantially similar commercial impressions, and that there is a likelihood of confusion. (emphasis added).<sup>37</sup>

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<sup>33</sup> *Spaulding Bakeries, Inc.*, *supra* at 356.

<sup>34</sup> *Id.*

<sup>35</sup> Opposer's Trial Brief, p. 13-15.

<sup>36</sup> *In re Nationwide Industries*, 6 USPQ2d 1882 (1984).

<sup>37</sup> *In re Nationwide*, *supra* at 1884.

When goods and/or marks are identical, the Board and courts may look at things like trade dress to determine if the commercial impressions of marks are the same. Here, the marks and the goods are not identical, and so such an analysis is not appropriate.

Franciscan further argues that the fact that BeauxKat chose a mark that intended to convey a sense of an “established brand” leads to a conclusion of intent to confuse. This argument makes a logical leap that is not sensical. Mr. Bowman’s testimony was that his logo design (not the word mark itself) was intended to create an “Old World” look and feel and that it would look like an “established brand”.<sup>38</sup> From this statement, with absolutely no other analysis or evidence, Franciscan alleges that the “only conclusion” is that BeauxKat wanted consumers to “believe that its brand was in fact Opposer’s very well established brand.”<sup>39</sup>

There is no basis to conclude that a desire to have a logo with an “Old World” look means that BeauxKat is intending to confuse consumers. Many beers, both new and old, design logos with such an “old” look and feel, something that the Board is entitled to take on judicial notice. Franciscan’s leap in logic does not lead to a conclusion of substantial similarity.

It is only when marks or products are identical, not just similar, but identical, that analyses like those advocated by Franciscan are appropriate. Franciscan quotes another case, *In re Martin’s Famous Pastry Shoppe, Inc.*, describing the finding from *Martin’s* as requiring a finding for Franciscan on this factor when marks are “very similar”.<sup>40</sup> But in fact, the *Martin’s* case says this: “This factor weighs heavily against applicant, as the two word marks are *identical* (emphasis added).”<sup>41</sup>

Franciscan may not dissect the marks in question to compare only parts of the mark, and its word and pictorial marks are not identical to BeauxKat’s mark, eliminating the appropriateness of forays into trade dress and other marginal analyses. There are significant differences in these marks that cannot be ignored without ignoring the appropriate case law. Therefore, the *DuPont* factor regarding similarity or dissimilarity of the marks must be found in favor of BeauxKat.

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<sup>38</sup> Deposition of B. Bowman, p. 62, ln. 1-16.

<sup>39</sup> Opposer’s Trial Brief, p.17.

<sup>40</sup> Opposer’s Trial Brief, p.17.

<sup>41</sup> *In re Martin’s Famous Pastry Shoppe, Inc.*, 223 USPQ 1289, 1290, 748 F.2d 1565 (1984).

## **2. Beer and wine should not be considered related products.**

Franciscan goes to great lengths to try and show that beer and wine are related products. Of note, however, is that Franciscan does not claim that its other products, barbeque sauce and clothing items, are related products, therefore, with regard to this *DuPont* factor as regards the opposition based on Franciscan's non-wine marks, this factor favors BeauxKat.

### **a. Franciscan's argument overstates the presumptions to which it is entitled.**

Franciscan, in reliance on two cases, *Warnaco, Inc. v. Adventure Knits, Inc.*, and *Guardian Products Co., Inc. v. Scott Paper Co.* lists three "presumptions" which it claims act in its favor. Indeed, these two cases do set out presumptions that the Board may make when the goods and marks involved have no restrictions or limitations in the respective recitation of goods. However, Franciscan significantly overstates these presumptions and their effect.

It is on their third stated presumption that Franciscan overreaches: "the parties' products reach or will reach the same potential users and/or consumers".<sup>42</sup> In fact, what the *Warnaco* and *Guardian Products* cases do say is that it may be presumed only that the products "are or can be sold through all of the trade channels that can be utilized *for such goods*; and that they are or can be sold to all potential users or customers *for such goods* (emphasis added)."<sup>43</sup> In other words, BeauxKats' beers are presumed only to be available to all potential customers and users **of beer**, and Franciscan's wines are presumed only to be available to all potential customers and users **of wine**. There is no presumption of a crossover, that issue must be established by evidence from the parties, which Franciscan fails to do.

### **b. The evidence shows that there are distinct markets for beer and wine.**

Mr. Doug Engler's expert testimony is on just this issue, whether or not the marketing channels and potential consumers for beer and wine are so identical as to make them "related" products. Mr. Engler experience on this issue is ideal. He runs a store called "Malt & Vine" that

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<sup>42</sup> Opposer's Trial Brief p. 17.

<sup>43</sup> *Warnaco, Inc. v. Adventure Knits, Inc.* 210 USPQ 307, 315 (1981); *See also Guardian Products Co., Inc. v. Scott Paper Co.*, 200 USPQ 738, 741 (1978) ("[T]hey [the goods] move through all of the normal channels of trade *for such goods* to all potential purchasers thereof (emphasis added)").

sells beer and wine to consumers, with sales of approximately \$500,000 per year. He is uniquely qualified to opine on the relative markets of both products.<sup>44</sup>

Regarding the relative markets for these two products, Mr. Engler opines as follows:

Q: Why the difference in the way that you market the beer and the wine?

A: It's a different customer. We have different clientele. Certainly after two years of working in the retail environment and selling these products every day to the customers of the Redmond and the Greater Eastside I found that people distinctly define themselves as either a beer person or a wine person. Sometimes they'll be shopping for both, but maybe you know it's a couple that comes in or whatnot. But definitely we want – we feel that there's a specific customer that comes in. They're either looking for wine or they're looking for beer. People tend to have defined themselves as one way or the other. If you stop anyone on the street and ask almost any person, "Are you a beer guy or a wine guy," they'll tell you which one they enjoy and which one they drink more often.

Q: Would you say there is direct competition between beer and wine?

A: Oh, I don't think so. I think with the fact that people have classified themselves into one category or the other, that's their beverage of choice.

Q: So it's not the same end consumer?

A: No, certainly not. And that's one of the reasons we do carry both beers and wines. If we only carried beer – we're trying to get a different consumer, different subset. We're not trying to take the same dollars – different dollars from the same consumer, we're trying to get different consumers. The wine portion of our business is definitely – the revenue, you can see that it's coming from a different source than the beer.<sup>45</sup>

The evidence here shows that there are distinct markets for beer and wine, as regards the end consumer.

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<sup>44</sup> Deposition of D. Engler, p. 5-9.

<sup>45</sup> Deposition of D. Engler, p. 10, ln. 16 – p. 11, ln. 24.

**c. As the parties products occupy different strata in their own markets, their markets are even more clearly differentiated.**

When examining this issue not just in the context of beer and wine, but in the context of the products of the parties to this matter, the distinction between the products becomes even more evident. With regard to BeauxKat's products, Mr. Engler described them as follows:

Q: Would you consider the products that are being done by Black Raven Brewing Company to be of those products that would be sold in an impulse situation?

A: Oh, absolutely not. I mean, they're very specialty products. This is going to be a consumer who's going out and looking for the product itself.<sup>46</sup>

Q: Are you familiar with Black Raven Brewing Company?

A: Yes, I am.

Q: How would you categorize their products?

A: They are a high end craft microbrewery.

Q: Are they an expensive or inexpensive product?

A: An expensive product.<sup>47</sup>

Mr. Engler, having a more than passing knowledge of Franciscan's products, described them as follows:

Q: Are you familiar with Ravenswood Wine?

A: Yes, I am.

Q: How would you categorize this wine?

A: Ravenswood is a significant winery. They're basically mass produced wines. I think they do 100,000 plus cases, which is – that's 1.2 million bottles. That's a pretty good amount of wine. And the vast majority of their wine is what we would call in the industry grocery store wine, wine that's likely to appear in a significant number of grocery stores and markets and find a pretty good depth of penetration.

Q: Would you consider it an expensive or an inexpensive product?

A: An inexpensive product, for us. Certainly they do have a very small amount of their production which is high end,

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<sup>46</sup> Deposition of D. Engler, p. 12, ln. 21 – p. 13, ln. 2.

<sup>47</sup> Deposition of D. Engler, p.15, ln. 15-23.

but the vast majority of their wines are in that under \$10 range on the shelf.<sup>48</sup>

As you can see from this evidence, these products are significantly differentiated in their own markets. While Franciscan's Ravenswood products are "grocery store wines" and are inexpensive and available to the average consumer at places they might frequent for many reasons such as grocery stores, BeauxKat's Black Raven Brewing Company products are high-end microbrews, and are currently served only in special events and at their own taproom (and at some small events/bottle houses).<sup>49</sup>

The Parties' evidence showing press coverage of their two products only highlights these differences. Franciscan advertises in national magazines and large scale publications,<sup>50</sup> while most of BeauxKat's publicity has been of a local variety, or is confined to strictly beer-related events like the North American Brewers Association Competition.<sup>51</sup> These parties are marketing and selling to different sets of end users.

These two products do not have "conditions and activities surrounding the marketing of the goods ... such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originated from the same producer."<sup>52</sup>

**d. While beer and wine can be related, that relation is irrelevant here.**

BeauxKat acknowledges that there is case law indicating that beer and wine can be considered to be "related products".<sup>53</sup> However, the question under this DuPont factor is really whether these two products, Black Raven Brewing Company beer, and Franciscan's Ravenswood wine are similar or dissimilar. When examining the two products and the evidence

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<sup>48</sup> Deposition of D. Engler, p. 14, ln. 17 –p.15, ln. 9.

<sup>49</sup> Deposition of B. Bowman, p. 20, ln. 24-p.21, ln. 17.

<sup>50</sup> Opposer's 8<sup>th</sup> notice of reliance.

<sup>51</sup> Deposition of B. Bowman, Exhibits 8, 9, 11.

<sup>52</sup> *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (1991) (as cited in Opposer's Trial Brief, p. 18).

<sup>53</sup> Although they have also been found to not be related products. *Compare In re Coors Brewing*, 2002 WL 1766343 (TTAB Serial No. 75/599,304, July 31, 2002) (*Finding* that beer and wine are not related products).



regarding them, it becomes quite clear that these two products are distinct and are not targeted towards the same end consumer.

Franciscan's evidence on this point is limited to generalities regarding beer and wine. However, the undisputed evidence as shown above is that these two specific products themselves are of little or no relation.

Franciscan has listed 50 marks that name both beer and wine as their categories in an attempt to show that beer and wine are related products. However, this analysis is misleading in that it tells the Board nothing about how these marks compare the entire universe of marks for beer and wine. The Board should take notice of the fact that these 50 or so marks identified by Franciscan represent less than one percent of all marks for beer or wine.

Franciscan relies on the presumptions that it identified to argue that these two products are related. But even if the presumptions were as Franciscan identified them, presumptions may be overcome with evidence. The evidence here shows that these products are not similar as they occupy different strata in their respective markets. This factor should favor BeauxKat.

**3. Franciscan oversimplifies the issue regarding the similarity of established, likely-to-continue trade channels.**

Franciscan's argument on this *DuPont* factor is simple: beer and wine are sold in restaurants, liquor stores and markets, and the possibility of these products being sold in similar locations exists. However, this is an oversimplification of this factor. For instance, if Franciscan's analysis were the sole methodology for reviewing this factor, every item sold in a supermarket could potentially be subject to trademark cancellation on the basis of likelihood of confusion.

The real question that determines whether any particular *DuPont* factor is relevant in a case is whether or not it tends to establish a likelihood of confusion in consumers. Here, the analysis of trade channels adds little that was not discussed above regarding similarity of the goods. That the goods share locations of sale and distribution channels is not at issue. The issue is whether those similarities are relevant here.

The evidence already discussed shows why this factor is not relevant. BeauxKat's beers and Franciscan's Ravenswood wines do not travel in the same circles. One is a high end,

expensive microbrew. The other is an inexpensive, mass-produced, grocery store wine. Whether or not they might ever be available in the same restaurant does not alter the fact that they are not likely to be confused by consumers.<sup>54</sup>

**4. Fame of marks is not dispositive in this matter.**

Franciscan claims that the “fame” of its marks somehow makes it more likely that confusion may result. However, we are not dealing with a product that enjoys a wide fame among the general populace like “Yellowtail” or other significantly famous wine brands, and Franciscan has not submitted any evidence of such fame. While there is no factual dispute that Ravenswood as a wine is more widely known than Black Raven Brewing Company as a beer, the point is that the fame of these marks would only be relevant if they were identical marks or goods, as has been discussed above. Because they are not identical, the fact that a product of a separate category is famous has little or no impact on whether any consumer will actually be confused.

**5. Factor 6, number and nature of marks on similar goods, favors BeauxKat.**

Franciscan expends considerable effort to show that all alcoholic products are “related” early in their briefing. However, when they reach this factor, they suddenly only examine beer and wine. Their statement regarding no related products using any form of RAVEN mark is wrong. The Board should take notice of this fact and the fact that there are RAVEN marks in use on other alcoholic beverages (specifically CUERVO and others). However, the fact that there is, according to Franciscan, only one wine mark incorporating RAVEN and only one beer mark incorporating RAVEN should support BeauxKat as it is possible for both marks to have strength within their categories.

**6. There is absolutely no evidence of any actual confusion.**

Franciscan conveniently brushes aside this factor as meaningless by playing a semantic game regarding the way BeauxKat intends to use its mark. What Mr. Bowman actually testified is that the BLACK RAVEN BREWING COMPANY mark is on every beer they produce, but

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<sup>54</sup> Incidentally, Franciscan tries to make it seem like Ravenswood is a wine that could easily show up in BeauxKat’s own taproom. (See Opposer’s Trial Brief, p. 24). In reality, there is absolutely no way that BeauxKat will ever allow a Franciscan product inside their business.

that different beers also have their own name, and no individual beer is named just “BLACK RAVEN BREWING COMPANY”.<sup>55</sup> The mark is used on beer.

More importantly, Franciscan cannot point to a single occurrence of even the mildest consumer confusion. It does not exist. BeauxKat opened their taproom in May of 2009,<sup>56</sup> and no examples of confusion have occurred from then until now. This factor must weigh in favor of BeauxKat.

**7. The only confusion possible would be deminimis.**

The worst case scenario between these two marks is that eventually, far in the future, if BeauxKat should ever sell its beer in restaurants where Ravenswood is sold, a customer might see both and wonder if they come from the same place. Because people are generally inclined to prefer beer or wine, there is no chance that a person intending to buy Ravenswood wine would ever buy a Black Raven Brewing Company beer instead. Even if it did, we are debating over a few drops in the well as far as Franciscan is truly concerned.

There is just no reason to believe that consumers will be confused to any significant degree, or indeed at all.

#### **IV. CONCLUSION**

The likelihood of confusion analysis is not a scoreboard where the party who gets the most factors wins, or a mathematical analysis. In the end, it comes down to this: is it truly likely that a consumer is going to confuse these products as to their source? The answer to that is simply no. Franciscan sells a specialized product, inexpensive, entry-level, grocery store wine. BeauxKat produces a specialized product, high-end, microbrewed, craft beer. In truth, there is little crossover between these markets. Moreover, the marks have enough distinction that a consumer is not likely to be confused. The Board should uphold the decision of the Examiner to issue this trademark and find against the Opposer.

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<sup>55</sup> Deposition of B. Bowman, p. 59, 60, ln.21-p. 61, ln. 7.

<sup>56</sup> Deposition of K. Gillespie, p. 17, ln. 20-22.

DATED this 26<sup>th</sup> day of February 2010.

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of Applicant's Response to Opposer's Motion for Summary Judgment was forwarded by first class, postage pre-paid mail by depositing the same with the U.S. Postal Service on this 26<sup>th</sup> day of February, 2010 to the Opposer at the following address:

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